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IN THE

Supreme Court of the United States

JUNE TERM, 1931—No. 217

WILLIAM STEVENS,

Petitioner,

against

The vessel "WHITE CITY," her engines, tackle, apparel, etc.,

Respondent.

PETITION AND BRIEF FOR WRIT OF CERTIORARI.

WILLIAM F. PURDY,
NEIL P. CULLOM,
JAMES E. FREEHILL,
Counsel for Petitioner.

HENRICKS & LUDEMANN, INC., New York City

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WILLIAM STEVENS,
Petitioner,

against

The vessel "WHITE CITY," her engines, tackle, apparel, etc.,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

I. Your petitioner respectfully prays for the issuance of a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review the decision rendered April 6, 1931, which reversed a decree of the United States District Court, Southern District of New York, entered April 14, 1930, after a trial in admiralty before Judge John M. Woolsey in favor of the libellant (petitioner) in the sum of $1,410.35, and dismissed the libel (pp. 328-329).

II. Certified copy of the entire transcript of the record of the case is submitted herewith.

III. The petitioner (libellant) instituted this action by filing of a libel and complaint against the respondent (vessel "White City") for damages sustained to a motor yacht, the "Drifter," arising out of a breach of a contract of towage (pp. 4-7).

IV. The answer is in effect a general denial (pp. 8-24).

V. A decision was rendered in favor of libellant after a trial in admiralty before District Judge John M. Woolsey, and after assessment of damages before the special commissioner, a final decree was entered April 14, 1930 in the sum of $1,410.35 (pp. 311, 328, 329).

VI. The Circuit Court of Appeals reversed the decree on April 6, 1931. The opinion of the court was written by Circuit Judge Learned Hand. The court based its reversal upon the fact that although the motor yacht "Drifter" was delivered in good condition to the tug "White City," and was returned in damaged condition with no explanation of the circumstances under which it became damaged, nevertheless, there was no liability because a tug is not a bailee for hire and no presumption of negligence arises where tug receives a tow in good condition and delivers it in damaged condition. It was recognized that a presumption of negligence arises where the tow is under charter and that, in principle, the court stated it could not "distinguish between that and the situation at bar," because "the reason for imposing a presumption appears to be here quite as strong as in demises; that is, the greater opportunity of the bailee to explain the injury, due to the immediacy of his access to the barge and the bailor's absence." The court felt, however, that their decisions had "to strongly established an exception to justify a departure now," notwithstanding decisions to the contrary in other circuits.

VII. The petitioner is advised and believes that said decision of the Circuit Court of Appeals in this case is erroneous and that this Honorable Court should require the case to be certified for its review and determination in conformity with the provisions of section 240, Judicial Code.

VIII. Petitioner submits the following reasons why the judgment of the Circuit Court of Appeals reversing the

decree of the United States District Court should be brought here for review by this Honorable Court:

(1) Because the Circuit Court of Appeals has held that a tug performing a simple contract of towage is not a *bailee for hire,* even though the barge is in the exclusive possession and custody of the tug and no servant of the owner of the tow is present at the time the damage to the tow occurs. This is in conflict with the law of towage, as expressed in previous opinions of that court, as well as in opinions expressed by Federal Courts in other circuits (*McWilliams Bros., Inc.* v. *Director General,* C. C. A. [2nd], 271 Fed. 931, 932; *Hughes* on *Admiralty,* 2nd Ed. p. 129; 38 Cyc., title "Towage," p. 563; *The "Princeton,"* 19 Fed. Cases No. 11433, p. 1342, The *"Merrimac,"* 17 Fed. Cases No. 9478, p. 126; *Bust* v. *Cornell,* 24 Fed. 188; *The "D. Newcomb,"* 16 Fed. 274; *The "C. R. Sheffer"* [C. C. A. 2], 249 Fed. 600; *The "Delaware,"* 43 Fed. [2nd] 852 [D. C. E. D. Penn.]; *The "Genessee"* [C. C. A. 2nd], 139 Fed. 549; *The Seven Sons,* 29 Fed. 543).

(2) Because the Circuit Court of Appeals has held that in an action for breach of a contract of towage, a prima facie case of negligence is not made out against the tug, where it receives a tow in good condition and redelivers it in damaged condition, where the circumstances of the damage are not shown, even though the tow be unmanned at the time of the damage by a servant or bargee employed by the owner. This, we submit, is in conflict with the law of bailments as expressed in the opinion of this Honorable Court and in conflict with the law of towage as laid down by the Circuit Court of Appeals in other circuits (*Southern Railway* v. *Prescott,* 240 U. S. 632, 640; 6 *Corpus Juris,* p. 1158).

(3) Because the opinion of the Circuit Court of Appeals in this action is in conflict with the decided weight of authority and with the well settled law of New York (38 Cyc. Title "Towage," p. 563; 6 *Corpus Juris,* p. 1158,

Title "Bailments"; *Wintringham* v. *Hayes,* 144 N. Y. 5, and cases cited above), and the decision will create uncertainty in a branch of the fundamental law of contracts of towage, where certainty is a vital factor.

(4) Because the Circuit Court of Appeals erred in holding:

(a) That the tug "White City" was not a bailee for hire;

(b) That no presumption of negligence arises where a tug receives a tow in good condition and delivers it in damaged condition without an explanation of the cause or circumstances of the damage, and

(c) In failing to draw an inference of negligence by reason of the failure of the owners of the tug to comply with the terms of the contract and, particularly, in failing to guard the "Drifter" during the night of October 19th when it was moored at Fisher's Dock.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may issue and that your petitioner have such other and further relief as to this Honorable court may seem just.

WILLIAM STEVENS,
Petitioner.

WILLIAM F. PURDY,
NEIL P. CULLOM,
JAMES E. FREEHILL,
Counsel for Petitioner.

I hereby certify that I have examined the within petition and in my opinion it is well founded and entitled to favorable consideration, and is not filed for the purpose of delay.

WILLIAM F. PURDY,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES,

JUNE TERM, 1931—No.

WILLIAM STEVENS,
Petitioner,
against
The vessel "WHITE CITY," her engines, tackle, apparel, etc.,
Respondent.

BRIEF IN SUPPORT OF PETITION.

This is a petition, pursuant to Section 240, Judicial Code, for a review of the decision and the decree of the United States Circuit Court of Appeals for the Second Circuit, reversing a decree in Admiralty of the United States District Court for the Southern District of New York and dismissing the libel.

The material facts and the questions involved have been briefly stated in the petition and need not be repeated here.

The opinion of District Judge John M. Woolsey in the lower court is unreported and the opinion of the United States Circuit Court of Appeal is reported 1931 A. M. C. 1844 (not otherwise reported).

The Facts.

On October 13, 1925, Roos, an employee of the Consolidated Shipbuilding Corporation, had a telephone conversation with Alexander Simpson, father of one of the respondents, in which an arrangement was made for the

towage of the motor boat "Drifter" by a boat called the "Hilda." This conversation was confirmed by a letter of said date which reads as follows (p. 53):

"October 13, 1925.

Mr. Alec Simpson,
151st St. & Hudson River,
New York City.

Dear Alec:

Confirming our telephone conversation of this day, and agreement, please have your work boat 'Hilda' here at our works on Monday morning, the 19th at 6 a. m. to tow 45' launch on cradle from Morris Heights to the Trans-Marine Steamship Company, alongside of steamer 'Suscolanco' at Port Newark, N. J. See Captain Lewis on arrival at pier. It is important that this boat arrive at the steamer before 3 P. M. that day.

Yours very truly,

CONSOLIDATED SHIPBUILDING CORPORATION,
W. A. ROOS, JR.,
WAR:T Sales Dept."

Subsequent to the receipt of this letter and prior to October 19, 1925, Roos was advised that the "Hilda" was not available, but that another boat known as the "White City," owned by Simpson's son and son-in-law, would do the towing (pp. 54, 55). The substitution was agreed to prior to the morning of October 19th, 1925, and again Roos advised that the boat must be there at 6 a. m. on October 19th, 1925 (p. 54).

It was admitted that the "White City" did not arrive at 6 a. m. but came there at 8 a. m. Employees of the Consolidated Shipbuilding Corporation assisted in attaching

the "Drifter" to the "White City" by a 40 foot rope and, by another rope, attached the cradle to the stern of the "Drifter." The boat was owned by T. C. Frost and was at his risk during the towage (pp. 64-70).

The Consolidated Shipbuilding Corporation put one of its laborers (Weston) on the "White City" to tend to the lines when she would be alongside the steamer to which it was to be delivered by the "White City." Weston was not a licensed captain but merely a general handyman around the dock and did not operate the "Drifter" since it had no motor power (pp. 58, 59, 61, 62 and 66).

It was conceded that the "Drifter" was in good condition when it was received (pp. 71, 78).

The "White City" with its tow, proceeded along the Harlem River and down the East River until it reached Hell Gate when the cradle to the stern of the "Drifter" became detached and a delay of fifteen to twenty minutes occurred, because it was necessary to again attach the cradle (pp. 85-87). No damage occurred to the "Drifter," at that time.

Thereafter the "White City" with its tow continued down the East River, across the bay, through Kill van Kull, into Newark Bay, where the "White City" sighted the s. s. "Suscalanco," on which boat the "Drifter" was to be shipped (p. 87).

Simpson testified that this was 5 p. m. but the answer fixes the time as 3:30 p. m. (pp. 15, 87). The claimant, instead of proceeding direct to destination, proceeded to Fisher's Dock at Bayonne, N. J., although it was but a thirty minute trip to the Trans-Marine dock (pp. 87, 88, 101). The "White City" and its tow were tied alongside of Fisher's Dock where it is stated by Simpson that big rubber tires or fenders were put out to keep the "Drifter" from banging or scratching against the dock. It was not shown which side was nearest Fisher's Dock, nor how the boat was moored or whether lights were put on the boat

during the night. *During the night it was not guarded by any watchman.*

Simpson testified that at Fisher's Dock claimant Rhodes telephoned the Consolidated Shipbuilding Corporation and was unable to speak to anyone in authority except a watchman who had told him "to bring the boat back" (p. 87). Simpson also stated that Rhodes thereupon telephoned his father-in-law, Alexander Simpson, who he claims told him that the "Drifter" was to go on another steamer because the orders were changed; that he "should take the boat to Port Newark, that next day, or as soon as we could get there" (pp. 87, 88).

Alexander Simpson testified that he could not remember any such conversation with his son-in-law, Rhodes (Supp. Vol. p. 18). Rhodes was then asked by Weston if he could not go home that night, to which he replied (Supp. Vol. fol. p. 28):

> "I didn't see any reason why he should stay. As far as I was concerned, I didn't see any reason either why he should stay. It wasn't my business to know any reason."

When asked if he told Weston to go home he stated, "I told him he could go home" (Supp. Vol. p. 47).

It is conceded that on the morning of October 20th, 1925, when the tug with its tow proceeded to destination, that no request was made by respondent to the Consolidated Shipbuilding Company for Weston or any other laborer (p. 104).

During the night of October 19, 1925, while the "White City" and its tow was moored to Fisher's Dock, the claimants slept on the "White City" leaving no one to watch the "Drifter" (pp. 88, 100). No account is given of what happened on the night of October 19, 1925, while the "Drifter" was at Fisher's Dock.

Although Simpson stated that on the morning of October 20th he looked over the "White City" and the "Drifter," and that they were in perfect condition, because he "could not see anything wrong anywheres" it is obvious that he made no inspection because on cross examination he was asked particularly what he did that morning, and he stated that he went aboard the "Drifter" to steer her, and that he did not do anything else from the time he got up that morning until he went on the "Drifter" (pp. 89, 102).

The "White City" with its tow arrived on the morning of October 20th, 1925 at Trans-Marine Pier, at Port Newark, New Jersey, at about 7:30 to 8:00 a. m. The weather was clear and the sun was shining (p. 72).

Although the respondent denied in its answer and vigorously contended on the trial that the "Drifter" was not damaged in its possession, the trial judge stated that he believed the libellant's witnesses who said that the "Drifter" was damaged when it arrived, which was corroborated by the damage receipt taken by the owners of the "White City" without protest (p. 309).

This finding was approved by the Circuit Court of Appeals, which stated:

> "We see no reason to question the conclusion that the hole was made during the trip, and we dispose of the case upon that assumption."

Bauer, who saw the "Drifter" coming toward the dock, stated that he saw "a hole stove in her, midship, right above waterline" and that upon examination "there were five planks gone in her" (pp. 71, 72).

The trial judge found "that neither Rhodes nor Simpson (owners of the tug) could explain what, how or where the damage happened," which finding was expressly approved by the Circuit Court of Appeals (p. 309).

With respect to the claim made by the owners of the "White City" that the damage was caused by driftwood, Judge Learned Hand said:

> "They suggested that a piece of driftwood, of which there was much in the bay at that season, might have stove in the yacht's side, but this was merely an assumption."

The testimony of the respondent was characterized in the opinion of the Circuit Court of Appeals as "to scanty to meet this test," to wit, of explaining how the injury occurred or else that it was not caused by neglect.

POINT I.

A tug performing a simple towage contract is a bailee for hire, particularly where the tow is manned only by a servant or bargee who is not present during the period when the damage to the tow takes place.

District Judge Woolsey, an eminent authority on admiralty matters, found that under the facts of this case, the "White City" was a bailee for hire.

The United States Circuit Court of Appeals, however, relying on the decision of this court in the steamer, *"Webb,"* 14 Wall. 406, held otherwise, stating:

> "There is no doubt that a towage contract, simpliciter, does not put the tow in bail to the tug."

This statement of law is erroneous and contrary to that court's previous decisions.

In *McWilliams Bros., Inc.* v. *Director General*, C. C. A. (2nd) 271 Fed. 931, 932, Circuit Judge Rogers, writing for the court, said:

> "The highest degree of skill is not required, for she (the tug) is not a common carrier; neither is she an insurer; *she is merely a bailee for hire.*"

This opinion was concurred in by Judge Manton and the late Judge Ward.

In *Hughes on Admiralty,* 2nd Ed. it is stated (p. 129):

> "There are some early decisions to the effect that a tug boat is a common carrier but the later authorities have settled thoroughly that it is not, *but only an ordinary bailee liable for ordinary negligence,*"

In *Brinton and Drifting Barges,* 1931 A. M. C. 852 (not otherwise reported), the Circuit Court of Appeals for the Second Circuit held that the Pennsylvania Railroad was a bailee where it maintained a mooring rack at South Amboy, for the delivery of barges to be loaded with coal. The court said (p. 857):

> "As to the barges themselves there was, however, such a duty. The road was a bailee. (Citing cases.) The relation is analogous to that of a tug which temporarily moors a barge en route, or at the end of the voyage, *Bouchard* v. *Pa. R. R. Co.,* 1925 A. M. C. 486, 6 Fed. (2d) 362 (2 C. C. A.); *McWilliams* v. *Davis,* 1923 A. M. C. 29, 285 Fed. 312 (2 C. C. A.); *Howard,* 252 Fed. 85 (2 C. C. A.). Though it does not appear that the road towed all the barges from New York to South Amboy, that in our judgment made no difference. The rack was the place fixed by the road for the delivery of barges to be loaded and then put into its tows. Nobody could expect an owner's tug to stand by until at the road's convenience it should take a barge out to be laden. Nor is it reasonable to suppose that nobody should meanwhile be responsible for its care, being itself helpless. We hold that the road received the boats as bailee and became responsible for a bailee's care until they were delivered."

During the towage to Fisher's Dock, no damage to the "Drifter" occurred, and while the "Drifter" was being

towed to that point there was on board a colored laborer, an employee of the Consolidated Shipbuilding Corporation, which built the "Drifter," who had nothing to do with the operation of the "Drifter" since it had no motor power (pp. 58, 59, 61, 62, 66).

Roos who made the contract for the towage, on cross examination, testified that Weston was a laborer employed as a general handy man around the dock and that *he did not have charge* of the "Drifter."

The record on this point reads as follows (pp. 58, 59, 61, 62):

> "Q. Why was he (Weston) placed there (on the 'Drifter')? A. Because it is the usual custom to have a man go alongside of the steamer to take a line on the dock, and see that the boat is fended off the dock.
>
> "Q. And to take care of the boat while it is being conveyed? A. He has nothing to do with that."

There is no question but that the "Drifter" was in the possession and under the custody of the tug "White City" during the towage, and particularly between the time the tug arrived at Fisher's Dock and the time when it was delivered at destination, because during this latter period Weston was not on board, having left the "Drifter" when she arrived at Fisher's Dock with the express consent of the owners of the tug "White City." This statement is supported even in the opinion of the Circuit Court of Appeals, wherein it stated:

> "She took the yacht and cradle upon a hawser and started out, there being no one on the tow except a servant of the builder, whose duties were no different from those of the ordinary bargee, and whom we shall consider as such. * * * The bargee (after the 'Drifter' arrived at Fisher's Dock) not wishing to stay aboard, announced that he would leave, to which the master of the 'White City' did not object, and he left."

The master of the "White City" testified that Weston asked permission to go home, to which he consented (Supp. Vol., pp. 27, 28).

The testimony of the master on this point is (Supp. Vol., p. 47):

> "Q. You sent Fred Weston home, didn't you, when you got to Fisher's Dock? A. I didn't send him home, no.
>
> "Q. You told him to go home? A. I told him he could go home."

It is apparent that Judge Hand misinterpreted the language of this court in the steamer *"Webb,"* 14 Wall. 406 (1871). Nowhere in that decision did the court state that a tug was not a bailee for hire. The court said, speaking through Judge Strong:

> "It must be conceded that an engagement to tow does not impose either an obligation to insure or the liability of common carriers."

This is far different from holding that a tug is not a bailee for hire or that an engagement to tow is not a bailment.

In *Transportation Line* v. *Hope* (1877), 95 U. S. 297, also relied upon, this court particularly pointed out that the tug did not have exclusive control of the tow, nor exercise any dominion over the protection of the tow and its cargo.

This court said (p. 300):

> "The transportation company * * * did not have exclusive control of the barge * * * nor did it exercise that internal control of its cargo, its storage, its protection and the like which belong to a bailee * * *."

In the case at bar, however, the tow carried no cargo but was merely a pleasure boat. It was in exclusive possession and under the control of the tug. During the night of October 19, 1925, no representative of the owner of the "Drifter" was present. It was moored to the dock by the owners of the "White City" whose duty it was to protect it from damage.

Since a tug is not a common carrier or insurer, what else could it be, other than a bailee for hire? The "White City" made a contract to receive the "Drifter" at the Consolidated Shipbuilding Corporation yard and to deliver it alongside the S. S. "Suscalanco" at Trans-Marine Dock at Port Newark, New Jersey. The contract provided for no exception of any character, nor did it limit the obligation of the tug to safely deliver the "Drifter" (p. 53).

In *The Princeton,* 19 Fed. Cas. 11433 at page 1342, the court said:

> "I think the owners of a towing vessel have not imposed on them by law any higher obligation than that of bailees for hire * * *."

In *Bust* v. *Cornell,* 24 Fed. 188, a tug was towing a canal and pile driver, which became loose because of defective cleats. The pile driver had no crew. Whether or not the canal boat had a crew, did not appear in the opinion. The court, in describing the obligation of the tug, stated:

> "They were bailees for hire, having life and property in their keeping."

In the *D. Newcomb,* 16 Fed. 274 (W. D. Penn.), it was necessary to define the obligation of a tug performing a simple towage contract. The court stated:

> "They were bailees for hire."

In *Sturgis* v. *Boyer*, 65 U. S., 23, this court stated that a tug performing a stowage contract has exclusive control, direction and management of its tow, even when the tow has on board a mate or stevedore at its wheel.

In *The Delaware*, 43 Fed. (2) 852, District Judge Kirkpatrick stated:

> "It has been held that the owner of a tug to whom a vessel has been delivered under an ordinary contract of towage is a bailee for hire."

In the foregoing case, the court expressly approved the decision of District Judge Woolsey in this case stating that his opinion represented a correct statement of the law.

In the *Genesee*, 139 Fed. 549, C. C. A. (2) a contract of towage was stated to be a contract of bailment and that the obligation of the tug was that of a bailee for hire.

In *The Seven Sons* (District Court, W. D. Pa.), 29 Fed. 543, the court stated:

> "Now, here, the owners of the tug boat were bailees for hire of the flat boat."

In *Newport News Shipbuilding and Dry Dock* (C. C. A. 4 [2]) U. S. 34 Fed. (2) 100, the court said:

> "The loss was due to fire which broke out upon a vessel delivered to the bailee for repairs, in a part of the vessel where only employees of the bailee were present."

It seems quite clear by the overwhelming weight of modern authority that a tug which takes possession of a tow under a contract of towage is a bailee for hire, particularly where during a part of the towage, no one representing the owner of the tow is present when damage occurs. In the case at bar, there is no question that from

the time the "Drifter" arrived at Fisher's Dock and stayed over night, and the time of arrival at destination, no representative of the owner of the "Drifter" was present, and therefore, it was impossible for anyone other than the owners of the tug to know the circumstances under which the "Drifter" became damaged. Can the owners of the tug be heard to say that they did not have exclusive possession and control of the "Drifter" after she arrived at Fisher's Dock, at which time Weston, the laborer, was permitted to go home?

POINT II.

Where a bailee for hire receives chattels in good condition and delivers the same in a damaged state, a prima facie case of negligence is made, which casts upon the bailee the burden of showing the circumstances surrounding the damage.

If the obligation of the "White City" is that of a bailee for hire, there can be no question but that the principle above stated is a correct statement of the law.

In *Southern Railway* v. *Prescott*, 240 U. S. 632, 640, the facts were that merchandise in the hands of a warehouseman, and therefore a bailee, was lost in a fire, which fact was shown and also the circumstances of the fire were such as not to raise an inference of lack of reasonable care on the part of the bailee. The court stated (p. 640):

> "As it is the duty of the warehouseman to deliver upon proper demand, his failure to do without excuse, has been regarded as making a *prima facie* case of negligence."

In *6 Corpus Juris*, page 1158, entitled *"Bailments,"* the distinction between the ancient and modern rule with respect to a presumption of negligence is recognized where it is said:

"Older Rule

"In some of the old decisions it was held that the loss or injury raised no presumption of negligence. * * *

"Modern Rule

"The rule adopted in the more modern decisions is that the proof of loss or injury establishes a sufficient *prima facie* case against the bailee to put him upon his defense. Where chattels are delivered to a bailee in good condition and are returned in a damaged state, or are lost or not returned at all, the law presumes negligence to be the cause and casts upon the bailee the burden of showing that the loss is due to other causes consistent with due care on his part."

The foregoing rule was recently announced by the Circuit Court of Appeals in *Cummings* v. *Pennsylvania Railroad,* 45 Fed. (2) 152, 153 as follows:

"The law on the subject was later correctly stated in the charge as follows:

"'If the jury find from a preponderance of all of the evidence that plaintiff's barge was in tight, staunch, strong and seaworthy condition when delivered under charter to the Pennsylvania Railroad Company, and was damaged when returned to plaintiff, your verdict must be for the plaintiff, unless defendant shows either how the damage occurred, and, second, that none of defendant's acts caused or contributed to that damage, or, first, everything it did with respect to the plaintiff's barge during the charter period, and, second, that none of its acts were negligent, as I have defined negligence in this charge.'"

The justice of the rule is very apparent because the bailor is usually ignorant in most cases, of the circumstances surrounding the damage to his property when it is in the possession of the bailee.

The Circuit Court of Appeals in refusing to adopt this principle of law in the case at bar, however, recognized its merit because it stated:

> "If free to choose we should follow the decision below."

The court, notwithstanding this, felt constrained to follow its own decisions on what we submit was an erroneous assumption that those decisions unqualifiedly held that a tug was not a bailee for hire.

The cases involving damage to barges under charter manned by a master and crew, where the principle has been applied, were reviewed.

The court said:

> "In the case of charters which are demises, we have often held that redelivery in damaged condition raises a presumption of negligence which the demisee must explain. * * *. *In principle we cannot distinguish between that and the situation at bar* and if free to choose we should follow the decision below. *The reason for imposing a presumption appears to be quite as strong as in demises;* that is, the greater opportunity of the bailee to explain the injury, due to the immediacy of his access to the barge and the bailor's absence. Though a distinction might have been drawn when a bargee is present, none ever has been, and the only ground we can imagine is that in a demise the period of custody is usually longer, not a satisfactory difference.
>
> "Our own decisions seem to us, however, to have too strongly established an exception to justify a de-

parture now. Whether this has arisen from confusing an ordinary towage contract where the owner or the tow remains in possession with a contract like this where the tow is unmanned, or manned only by a bargee, we cannot tell. Probably the doctrine generally applicable was carried over to this situation without observing the difference; so far as appears, the anomaly has not hitherto been observed."

We respectfully submit that in principle there is no distinction between damage to a barge under charter where the bargee is present and the situation presented in the case at bar, particularly where the cause of damage is unknown to the owner of the tow, and when it occurred while none of his representatives were present. If redelivery of the barge in a damaged condition in the former situation, raises a presumption of negligence, then surely, a similar presumption should be indulged in here.

If the modern rule adopted in recent decisions is followed, this unjust and inequitable distinction can be removed. It is a harsh rule which obligates the owners of a boat such as the "Drifter," to specifically point out negligent on the part of a tug boat which undertakes a contract of towage where the circumstances of damage are not explained, and which are unknown to the owner.

If the "Drifter," instead of being damaged, was never redelivered because of some unexplained reason which occurred during the night when it was tied up at Fisher's Dock and while the owners of the "White City" were asleep on their boat, the libellant would be powerless to establish affirmatively any negligence on the part of the "White City" resulting in its loss. It would naturally be against the interest of the bailee to reveal the circumstances of the loss if inconsistent with ordinary care and diligence.

In the case at bar, the failure to impose a presumption of negligence where the circumstances surrounding an in-

jury are not explained, amounts, we submit, with great respect, to a denial of justice, particularly when the owner of the "Drifter" had no representative present at the time of the damage. The owners of the tug boat and its employees by professing ignorance when they might otherwise have full knowledge of the cause of the damage, can defeat a just claim and thus places a premium upon concealment and suppression of evidence.

Modern conditions in the towage of boats in the harbor of New York are vastly different from those which obtained in 1870 at the time of the rendition of the decision of the United States Supreme Court in *The "Webb,"* 14 Wall. 406.

In *The "Webb,"* 14 Wall. 406, the manner in which the tow was damaged was shown and its owner had representatives on board. Since the tug departed from the true course of the voyage, the court stated that it "was enough to devolve upon the tug the duty of explanation."

The court did not say that a presumption of negligence could never arise in a case where a tug received its tow in good condition and delivered it in damaged condition. It merely stated that *ordinarily,* such a presumption did not exist. No doubt the court had in mind a situation of this character where under the circumstances, it would be just and equitable to hold that a prima facie case of negligence was not made out or proof that a tug received its tow in good condition and delivered it in damaged condition, without explanation of the circumstances under which the tow became damaged. This appears from the opinion of Judge Strong, wherein it is stated:

> "Unlike the case of common carriers, damage sustained by the tow *does not ordinarily* raise a presumption that the tug has been at fault * * * but there may be cases in which the result is a safe criterion by which to judge of the character of the act which has caused it."

The foregoing statement has unfortunately been taken to be an unequivocal statement that under no possible circumstances, would a presumption of negligence ever be drawn against a tug. Many courts have differed on the interpretation of this statement and unless it is clarified confusion and uncertainty will continue to exist.

At the time the *"Webb"* case was decided, it was the rule in New York cases, such as *Wells* v. *Navigation,* 2 N. Y. 204, and *Alexander* v. *Green,* 3 Hull (N. Y.) 9, that no presumption of negligence could ever be drawn against a tug, where it received in good condition, a tow, and delivered it in damaged condition. The rule announced in such cases has now been entirely changed by the Court of Appeals in later cases.

In *Wintringham* v. *Hayes,* 144 N. Y. 5, a yacht was delivered to plaintiff in good condition and returned in damaged condition. Judge Bartlett speaking for the Court of Appeals, said:

> "In the case at bar if the defendant, in support of his first counterclaim is able to prove the condition of the yacht when delivered to the plaintiff, the nature of the subsequent injuries she sustained, and that they were not the results of ordinary wear and tear, he will have made out a *prima facie* case and the burden of proof will be shifted to the plaintiff, who as bailee, had the yacht exclusively within his control and should be able to show the manner in which he discharged his contract obligations in the premises."

The reason for the departure from the ancient rule embodied in earlier decisions, is because of the demands of modern progress in transportation. This is made clear by later decisions of that court.

In *Strauss* v. *Canadian Pacific Railway Co.,* 254 N. Y. 407, the court had occasion to discuss early decisions of that court which stated that a contract for the carriage

of goods was purely private, in which the public had no concern, and therefore, the carrier could provide in its contract for exemption from negligence.

In departing from those decisions the court said (p. 412):

> "While the early decisions in this state expressed the public policy of the state at the time, changed conditions have resulted in a change of the public policy of the state.
>
> "The rule of freedom of contract which reflected the public policy of the state in the days of the canal boat and stage coach have ceased to be applicable under modern conditions."

The forceful language used by Judge Crane as to the function of the law stated in *Oppenheim* v. *Kridel,* 236 N. Y. 156, is very appropriate.

The question at issue was whether or not a wife could maintain an action for criminal conversation against her husband's paramour. The defendant urged that such an action could be maintained because of an ancient rule of law embodied in early decisions. Those early decisions, however, recognized the right of a husband to bring such an action. The court in departing from that ancient rule said, speaking through Judge Crane (p. 165):

> "In fact, there has been no objection raised anywhere to the right of the wife to maintain the action for criminal conversation except the plea that the ancient law did not give it to her. Reverence for antiquity demands no such denial. Courts exist for the function of ameliorating the harshness of ancient laws inconsistent with modern progress, when it can be done without interfering with vested rights."

And at page 164:

> "What is here said about 'natural right' and the 'flexibility of the common law' is equally applicable to an action for criminal conversation. If the husband has such an action, why should not the wife? The reasons for giving the action to the one are as potent for giving the action to the other, as I have above demonstrated. The common law is not rigid and inflexible, a thing dead to all surrounding and changing conditions. It does not expand with reason. The common law is not a compendium of mechanical rules written in fixed and indelible characters but a living organizm which grows and moves in response to the larger and fuller development of the nation."

Decisions of other federal courts outside the Second Circuit clearly indicate that a prima facie case of negligence is made out where a tug received a tow in good condition and delivered the same in damaged condition, where the cause of damage or the circumstances thereof is not shown.

See *Great Lakes Towing Co.* v. *Alve,* C. C. A. 7, 261 Fed. 261; *Susquehanna* v. *East.* (D. C. Mass.), 200 Fed. 317; *Burr* v. *Knickerbocker* (C. C. A. 1st), 132 Fed. 248; *Gilchrist* v. *Great Lakes Towing Co.* (E. D. N. J.), 237 Fed. 432; *Vessel Owners Towing* v. *Wilsa* (C. C. A. 7), 63 Fed. 626; *The "Delaware,"* 43 Fed. (2d) 852; *Pederson* v. *John D. Spreckles & Bros. Co.,* 87 Fed. 938; *The Seven Sons* (W. D. Penn.), 29 Fed. 543.

In *Burr* v. *Knickerbocker* (C. C. A 1st), 132 Fed. 248, it was held:

> "In order to prove negligence, it is not invariably necessary for the libellant to show the specific details of negligence, or account for the exact manner in which the injury is inflicted. When the libellant

proved that the moving of the vessel was in sole charge of the tug, that the schooner's wheel was hard aport, and that on a summer afternoon, with a light breeze and moderate tide, and with nothing to prevent the tug from having such full control of the schooner as would keep her in deep water, she was so towed that she came upon the westerly shore, or upon a well-known rock, before she had gone more than three or four length, a *prima facie* case of negligence was established."

In *Susquehanna* v. *East* (D. C. Mass), 200 Fed. 317, District Judge Dodd said:

"Under such circumstances the fact that the Devon (barge) grounded, raises a presumption that the tug was negligent. * * * The burden is on the tug to explain the cause of the disaster."

In *Gilchrist Transportation Co.* v. *Great Lakes Towing Co.* (E. D. N. J.), 237 Fed. 432, District Judge Haight said:

"* * * The mere happening of an accident may, under such circumstances, raise a presumption of negligence, and cast upon the tug the burden of demonstrating that it was not due to any failure of duty on her part, such as that the action was one of those inevitable occurrences for which no one is to blame. * * *"

In *The "Mason,"* 249 Fed. 718, District Judge Hough said:

"* * * In good weather and harbor waters, a tug in broad daylight put aground a vessel having at the time no motive power of her own, and completely under the control of the tugs. When these facts were

> shown claimant gave no evidence. If negligence is not inferable from such circumstances, it is difficult to imagine anything that could justify the conclusion short of proven intent to injure another's property."

In the case at bar, the "Drifter" was delivered on a fine clear day with a hole stove in its side at midship near the water line and no explanation was offered by the respondent. Under such circumstances, surely an inference of negligence should have been drawn.

In *Vessel Owners Towing* v. *Wilsa* (C. C. A. 7), 63 Fed. 626, a tug permitted a vessel in tow to strike an abutment extending below the level of the water and which had been there for twenty-five years. The court said (p. 63):

> "The collision occurred in broad daylight, and under such circumstances, the fact of the collision creates a presumption of negligence on the part of the tug."

In *The "Delaware"* (E. D. Penn.), 43 Fed. (2) 852, the court held that a prima facie case of negligence was made out by proof that the tow was delivered in good condition and was redelivered in damaged condition, which obligated the tug to go forward with evidence showing circumstances under which the loss of damage occurred. District Judge Kirkpatrick said:

> "Whether this view need be adopted or whether the bailment arising under such contract is *sui generis*, the law in the Federal Courts, as to the responsibility of the tug owner for loss or damage to the tow and as to the burden of proof in causes arising from such loss or damage, is well settled. The measure of the tug owners duty to the tow is ordinary care and diligency. He is not a common carrier, nor an insurer, but is liable only for loss occasioned by his negligence.

In a case of loss or damage, the libellant has a *prima facie* case if he shows that such loss or damage occurred while the subject of the bailment was in the exclusive custody and control of the bailee. This showing, however, merely imposes upon the bailee the duty of going forward with the evidence. It does not, properly speaking, constitute evidence of negligence. When the bailee accepts this duty and shows how the loss occurred, the force and effect of the *prima facie* case disappears. Then, unless it affirmatively appears from the evidence so produced, that the loss was caused by negligence of the bailee, the burden reverts to the libellant (or, perhaps more properly, the burden originally upon him is revived) and it becomes encumbent upon him to produce evidence of negligence on the part of the bailee; otherwise his case fails. The result will be the same, if as in the instant case, the libellant does not choose to rest his case upon proof of delivery and failure to return, but elects to adduce evidence showing the circumstances under which the loss occurred.

"As has been seen, if the tow is in the exclusive possession and control of the tug, it does place upon the tug the duty of going forward with the evidence and showing the circumstances under which the loss or damage occurred."

In the foregoing case the court held that while the tug need not show exactly what caused the damage, it must by evidence show the circumstances thereof. This is a rule that proceeds from reason. If no such obligation was placed on the tug, its owner and employees might otherwise defeat a just claim (by silence and concealment) particularly, where the bailor has no evidence of the circumstances under which its boat became damaged.

POINT III.

Even assuming the correctness of the decision of the Circuit Court of Appeals on the foregoing questions of law, the reversal was erroneous because there was ample proof of negligence on the part of the owners of the "White City" as well as facts from which the court could reasonably infer that the damage was caused by a negligent act.

Even if a presumption of negligence did not arise from the receipt of the tow in good condition and its delivery in damaged condition, the "White City" was clearly guilty of negligence in the following respects:

1. Although the "White City" agree to be at the Consolidated Shipbuilding Corporation on October 19th at 6 a. m., it did not arrive according to claimant's admission until 8 a. m. (pp. 53, 54, 83).

Connolly v. *Wilkes*, 23 Barb. 539.

2. Claimants arrived at Fisher's Dock at 3:30 p. m. on October 19th and without authority tied up at said place overnight without proceeding direct to destination, which was but a thirty-minute trip (pp. 87, 88, 101).

3. During the night of October 19th the "Drifter" was not guarded by a watchman, during which time the claimants were asleep on the "White City" (p. 88).

The Valentine, 131 Fed. 352;
Washington Tug & Barge Co. v. *Weyerhaeuser Timber*, 22 Fed. (2) 665.

4. Although Simpson testified that the "Drifter" was tied alongside Fisher's Dock and that bumpers were put out to prevent the boat banging or scratching against the

dock, it was not shown in what manner this boat was moored and particularly, if the "Drifter" was lighted during the night.

5. On the following morning the "White City" proceeded with her tow to Trans-Marine Dock without making any effort to telephone Consolidated Shipbuilding Corporation to obtain the services of Weston or some other laborer (p. 104).

Thus the "White City" was left without a lookout since Rhodes was operating the "White City" and Simpson was back on the "Drifter" (p. 104).

During the night of October 19th, while the "Drifter" was tied up at Fisher's Dock without any authority from the owner or its agent, and without any one to watch it during the night or to slacken its lines if necessary, it is possible that damage at that time occurred.

She might have been rammed by some other boat or if the lines were not slackened and the tide receded she might have been hanging on the side of the dock as the result whereof, a pile might have stove a hole in her side.

In *The Valentine*, 131 Fed. 352, the lighter was tied up to Pier 42, N. R., at a time when there was much ice in the river. During the night the bailee left no one in charge except a cook, deckhand and fireman, who were asleep. During the night the boat sank. The court said:

> "During the night the boat was practically deserted; she was substantially without a crew; *she had no watchman in any proper sense.* The equipment for pumping the water was valueless since it was inoperative. The negligence in the care of the cargo was gross."

In *Washington Tug & Barge Co.* v. *Weyerhaeuser Timber Co.*, 22 Fed. (2) 665 (C. C. A. 9) an action was brought by *Weyerhaeuser Lumber Co.*, the owner of a lumber

barge, W. T. No. 17, against *Brady & Katcham Lumber Company*, who in turn impleaded the *Washington Tug & Barge Co.*, who towed said barge, on the theory that it was primarily at fault. A decree was rendered against the Tug & Barge Company because of its negligence in leaving the barge unguarded by any watchman and leaving no lights exposed. The court said in affirming the judgment:

> "No watchman was left with the barge, and the court found that no lights were exposed. The Tugboat Company made no report either to the Williams Steamship Company or to Brady & Ketcham as to where it had moored the barge, or in what condition it left it. After so leaving it, it took no further concern in respect to it until about 12 o'clock, noon, next day, at which time on being requested to put it alongside the *Eagle* it learned that it was gone from the dock."

It was subsequently found damaged and the court continued:

> "How the barge escaped its moorings or was damaged is in a measure left to remote inference, if not speculation. If, however, the Tugboat Company was negligent in the respects found by the lower court upon evidence deemed to be sufficient, it is a fair conclusion that such negligence was the proximate cause of damage. 'I think' said the court, 'the Tug and Barge Company was negligent in leaving the scow at the Spokane Street dock without permission, and without a watchman in the absence of this permission, even though the place was the privileged place of the *S. S. Eagle.*'"

The court remarked that from the evidence, which was conflicting, the trial court might reasonably have drawn a

contrary conclusion since there was no direct evidence to support the findings that no lights were exposed. Nevertheless the court said:

> "While there was a want of direct and affirmative evidence to support the finding that no lights were exposed, we do not think the finding was unwarranted. Under the circumstances, the natural burden was on the Tugboat Company to show that it exercised reasonable care for the protection of the barge, and if it exposed lights knowledge of the fact was in its possession and not in the possession of either of the other parties. It not only refrained from making such proof, but on the other hand offered to show that it was under no obligation in the premises."

Although Simpson testified in answer to a leading question of his counsel that on the morning of October 20th he looked over the "Drifter" and found her to be "in perfect condition" and that he "could not see anything wrong anywheres," it was proven on cross examination that he never made any such inspection (pp. 89, 102).

On cross examination Simpson testified (p. 102):

> "Q. On the morning of October 20, what did you do? A. I was on the 'Drifter.' I went aboard the 'Drifter' to steer her like Captain Weston was doing before.
>
> "Q. You were on the 'Drifter'? A. I was on the 'Drifter,' yes.
>
> "Q. Did you do anything else? A. No, sir.
>
> "Q. You went to the 'Drifter'? A. Yes, sir.
>
> "Q. And steered her? A. Yes, sir.
>
> "Q. *And that is all you did from the time you got up that morning?* A. *Yes, sir.*"

Thus it appears beyond doubt that no inspection was made by Simpson on the morning of October 20th before

the "Drifter" left Fisher's Dock. It is, therefore, reasonable for the court to infer that the damage occurred during the night of October 19th when the "Drifter" was not guarded and probably unlighted. How could the appellant otherwise account for the damage when the trip from Fisher's Dock to destination was but five or six miles and the weather was fine and clear?

From the character of damage sustained to *The Drifter* the court might reasonably infer that the act which caused it was the result of negligence. In *The Kalkasha,* 107 Fed. 959 (C. C. A. 7), the court said, speaking through Judge Jenkins:

> "Although it may be said, the burden is upon the one alleging breach of contract of towage to show negligence or unskillfulness to his injury in the performance, still in some cases 'the result is a safe criterion about which to judge of the character of the act that caused it.' *The Webb,* 14 Wall. 406."

It is earnestly submitted that at all events there was affirmative proof of negligence on the part of the owners of the "White City" in the performance of towage, and surely there were facts established from which the court could reasonably infer that this damage was not caused by any act consistent with due care. The nature of the damage was "a safe criterion about which to judge of the character of the act that caused it." *The Webb,* 14 Wall. 406.

Much confusion now exists in Federal Courts and among maritime lawyers with respect to the true principle of law to be adopted in actions of this character. To secure uniformity of decision in the various Federal courts, and to remove the doubt that now exists in a subject matter of such great commercial importance, it is respectfully submitted that this court should review the decision of the Circuit Court of Appeals.

For these reasons petitioner's counsel respectfully submit that this court should issue its writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review this decision and settle the principle of law involved.

Respectfully submitted,

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